

Theodore P. Witthoft (State Bar Id. No. 021632)
COLLINS, MAY, POTENZA, BARAN & GILLESPIE, P.C.
201 North Central Avenue, 22nd Floor
Phoenix, Arizona 85004-0608
Telephone: (602) 252-1900
Facsimile: (602) 252-1114
Email: twitthoft@cmpbglaw.com
Attorneys for The Biltmore Bank of Arizona

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

In re:

STANLEY THOMAS LUND and JUNE
MARIE LUND aka LUND
MORTGAGE, INC.,

Debtors.

THE BILTMORE BANK OF
ARIZONA,

Plaintiff,

vs.

STANLEY THOMAS LUND and JUNE
MARIE LUND,

Defendants/Debtors.

Chapter 7

Case No. 2:09-bk-18416-CGC

Adv. No 2:09-ap-01577 CGC

**MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Plaintiff, The Biltmore Bank of Arizona (“Biltmore Bank”), by and through its attorneys, Collins, May, Potenza, Baran & Gillespie, P.C., hereby submits its *Motion for Partial Summary Judgment* against Stanley Thomas Lund (“Stanley Lund” or “Mr. Lund”) and June Marie Lund (collectively, the “Debtors”).

1 The Biltmore Bank is a judgment creditor of Stanley Lund's company Lund
2 Mortgage, Inc. (the "Corporation"). The Corporation became insolvent in September
3 2007. Subsequent to the Corporation's insolvency, Stanley Lund caused the
4 Corporation to make a series of transfers for his benefit and the benefit of his
5 community in the aggregate amount of \$97,018.30. Mr. Lund's actions were in breach
6 of his fiduciary duty to the Corporation's creditors. Consequently, the Debtors are
7 liable to the Corporation's creditors under Arizona's trust fund doctrine. Furthermore,
8 pursuant to 11 U.S.C. § 523(a)(4), Biltmore Bank is entitled to a nondischargeable
9 judgment against the Debtors in the amount of Biltmore Bank's *pro rata* interest in the
10 monetary transfers.
11

12 This Motion is supported by the accompanying Memorandum of Points and
13 Authorities, the *Statement of Facts in Support of Motion for Partial Summary Judgment*
14 ("SF") filed concurrently herewith and the entire record before the Court, all of which is
15 incorporated herein by this reference.
16

17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **Introduction**

19 This adversary proceeding involves the transfer of money and personal property
20 ("Assets") of the Corporation for little or no consideration by Stanley Lund. Mr. Lund
21 was the Corporation's designated mortgage broker, President, sole Director and sole
22 shareholder. The Assets were transferred, not to creditors of the Corporation, but to
23 Stanley Lund himself or to entities in which Stanley Lund or his family members held an
24 interest. These transfers occurred after the Corporation became insolvent in September,
25 2007. [SF §§ 6, 11, 12, 13, 15, 16].
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1 This Motion only pertains to the series of monetary transfers from the Corporation
2 to Stanley Lund totaling \$97,018.30. Biltmore Bank seeks partial summary judgment
3 from the Court declaring: (1) the Debtors are liable to the creditors of the Corporation for
4 having received the monetary transfers under Arizona's "trust fund doctrine"; and (2)
5 Biltmore Bank is entitled to a nondischargeable judgment against the Debtors, pursuant
6 to 11 U.S.C. § 523(a)(4), in the amount of Biltmore Banks' *pro rata* interest in the
7 monetary transfers. Biltmore Bank's *pro rata* interest in the transfers remains subject to
8 further disposition along with resolution of the issues concerning the transfer of the
9 Corporation's personal property and the Debtors' right to a discharge.
10

11 **Factual Background**

12
13 The Corporation was engaged in the business of obtaining residential home
14 loans. [SF § 5]. In connection with the business of obtaining home loans, Biltmore
15 Bank and the Corporation were parties to a "Wholesale Broker Agreement" which set
16 forth the terms upon which Biltmore Bank agreed to fund loans originated and
17 submitted to Biltmore Bank by the Corporation. [SF § 7]. In March 2007, Biltmore
18 Bank filed a state court lawsuit against the Corporation based upon the breach of the
19 Wholesale Broker Agreement. [SF § 8]. In May, 2009, the state court entered a final
20 judgment against the Corporation, awarding Biltmore Bank the principal amount of
21 \$291,046.52 and \$10,245.00 for its incurred attorney fees and costs, plus post-judgment
22 interest at the statutory rate of ten percent (10%) on both amounts (the "Biltmore
23 Judgment").
24

25 In December 2008, a new entity called Lund Mortgage Team, Inc. ("New
26 Entity") was created to "assist customers in getting residential home loans" with its
27 place of business, domestic address, agent mailing/physical address, telephone number
28

1 and website (which lists Stanley Lund as its President/CEO) the same as that of the
2 Corporation. [SF § 11].
3

4 Before the Corporation ceased operations, the Corporation transferred the
5 computers, telephones, office machines, and furniture of what had been an operation
6 employing 30 people to a company owned by Stanley Lund's daughter, Lund Realty,
7 L.L.C., but the Corporation only received "nominal" payment for these assets. [SF § 12].
8 Additionally, the Corporation transferred to the New Entity customer and contact lists,
9 customer records, customer relationships, and customer application files, human-capital
10 related intangible assets such as an in-place workforce, skilled and knowledgeable key
11 employees, and goodwill-related intangible assets such as the business's reputation,
12 patronage, and name recognition for which the Corporation received nothing. [SF § 13].
13

14 Stanley Lund also caused funds of the Corporation to be transferred to him or his
15 spouse or daughter loan repayments and/or equity distributions totaling \$97,018.30 (the
16 "Monetary Transfers"). [SF § 16]. The Monetary Transfers are the subject of this
17 Motion. The Monetary Transfers include the following:
18

<u>Date</u>	<u>Amount</u>	<u>Payee</u>	<u>Description</u>	<u>Check No.</u>
11/14/08	7,290.00	Stan Lund	Owner Reimbursement	1140
11/14/08	500.00	Stan Lund		1141
11/19/08	3,575.00	Stan Lund	Owner Reimbursement	1149
11/26/08	7,570.00	Stan Lund	Owner Reimbursement	1159
12/01/08	3,653.35	Stan Lund	Owner Reimbursement	1165
12/12/08	7,940.00	Stan Lund	Owner Reimbursement	1187
12/18/08	1,338.71	Stan Lund	Owner Reimbursement	1200
01/02/09	1,903.00	Stan Lund	Owner Reimbursement	1227
01/20/09	3,120.00	Stan Lund	Owner Reimbursement	unknown

1	01/30/09	3,571.10	Stan Lund	Owner Reimbursement	1320
2	02/13/09	6,920.75	Stan Lund	Owner Reimbursement	1355
3	02/27/09	4,048.19	Stan Lund	Owner Reimbursement	1434
4	03/13/09	8,570.36	Stan Lund	Owner Reimbursement	1472
5	03/31/09	4,048.19	Stan Lund	Owner Reimbursement	1518
6	04/15/09	4,065.41	Stan Lund	Owner Reimbursement	1557
7	04/15/09	1,278.48	Stan Lund	Owner Reimbursement	1558
8	04/30/09	2,923.10	Stan Lund	Owner Reimbursement	1617
9	04/30/09	310.00	June Lund	Owner Reimbursement	1618
10	05/15/09	4,076.22	Stan Lund	Owner Reimbursement	1668
11	05/15/09	3,740.22	Stan Lund	Owner Reimbursement	1669
12	05/29/09	4,076.22	Stan Lund	Owner Reimbursement	1714
13	05/15/09	12,500.00	Lisa Lund	Gift	1672

14 **TOTAL** \$97,018.30

15 The Biltmore Judgment remains due, owing and unpaid. Although there were
 16 funds in the Corporation that would have been available to creditors for the repayment of
 17 indebtedness, Biltmore Bank was unable to collect its share of those funds, because
 18 Stanley Lund caused those funds to be transferred to him or to insiders instead of being
 19 paid to creditors. The portion of the Biltmore Judgment that represents Biltmore Bank's
 20 *pro rata* share of the Monetary Transfers (which, for the purposes of this Motion, shall be
 21 referred to as the "Biltmore Debt") is subject to the Trust Fund Doctrine and should be
 22 excluded from a discharge in bankruptcy. [SF §§ 9, 12, 13, 15, 16 & 17].

24 Legal Analysis

25 To determine a debt is nondischargeable under 11 U.S.C. § 523(a)(4) for fraud or
 26 defalcation while acting in a fiduciary capacity, the plaintiff must establish:
 27

28 (1) an express trust existed;

1 (2) the debt was caused by fraud or defalcation; and

2 (3) the debtor acted as a fiduciary to the creditor at the time the debt was
3 created.

4 *In re Niles*, 106 F.3d 1456, 1459 (9th Cir. 1997). Here, all elements required to
5 establish the Biltmore Debt is nondischargeable in bankruptcy under 11 U.S.C.
6 §523(a)(4) are supported by indisputable evidence.

7
8 **An express trust existed.**

9 Arizona law has adopted the trust fund doctrine (“Trust Fund Doctrine”). *Lewis*
10 *v. Scott (In re Lewis)*, 97 F.3d 1182, 1185-86 (9th Cir. 1996); *Valley Bank v. Malcolm*,
11 23 Ariz. 395, 406, 204 P. 207, 211 (Ariz. 1922). The Trust Fund Doctrine provides
12 that all assets of a corporation, immediately upon that corporation’s insolvency,
13 constitute a trust fund that exists for the benefit of the corporation’s creditors. *Id.*
14 Under the Trust Fund Doctrine, after a corporation becomes insolvent, no rights may
15 be created, either voluntarily or by operation of law, whereby one creditor is given an
16 advantage over others. *Oney v. Weinberg (In re Weinberg)*, 410 B.R. 19, 29 (9th Cir.
17 BAP 2009) (citing *A.R. Teeters & Assocs. V. Eastman Kodak Co.*, 172 Ariz. 324, 331,
18 836 P.2d 1034, 1041 (App. 1992)). The Bankruptcy Appellate Panel of the Ninth
19 Circuit held that the Arizona’s Trust Fund Doctrine implicated an express trust
20 sufficient for purposes of the application of 11 U.S.C. § 523(a)(4). *Weinberg*, 410
21 B.R. at 28; *Nahman v. Jacks (In re Jacks)*, 266 B.R. 728 (9th Cir. BAP 2001).

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23
24 **The Corporation was insolvent.**

25 The Arizona statutes governing corporations (A.R.S. §10-120 *et seq.*) define
26 “insolvent” as the inability of a corporation to pay its debts as they become due in the
27 usual course of its business. A.R.S. §10-140 (2). This definition of insolvency is
28

1 applicable to actions under 11 U.S.C. §523(a)(4). *Weinberg*, 410 B.R. at 29-30.

2
3 Stanley Lund admitted that the Corporation was insolvent as early as September
4 2007. While under oath, Mr. Lund specifically agreed with the statement that the
5 Corporation was not generally paying its debts as they came due. [SF § 14]. Mr. Lund
6 testified that after September, 2007, the Corporation stopped paying any debts it had
7 previously incurred, having experienced a loss of 25 of its 30 employees because “they
8 weren’t bringing any loans in.” [SF § 14]. The first of the Monetary Transfers did not
9 occur until November 14, 2008, after the Corporation was admittedly insolvent. [SF §
10 16].

11
12 **Stanley Lund had a fiduciary duty to creditors of the Corporation.**

13 Generally, directors and officers do not owe a fiduciary duty to creditors of a
14 corporation. *Jacks*, 266 B.R. at 738. However, when a corporation becomes
15 insolvent, a fiduciary duty to creditors of the corporation is imposed on the insolvent
16 corporation’s directors and officers. *Id.* That duty is to use the remaining corporate
17 assets for the benefit of creditors. *Id.* Thus, officers become liable to creditors under
18 the Trust Fund Doctrine when a corporation transfers assets of the corporations to the
19 officers while the corporation is insolvent. *Id.*; *Weinberg*, 410 B.R. at 29 *citing*
20 *Teeters*, 172 Ariz. at 331, 836 P.2d at 1041 (App. 1992) (a director or officer of a
21 corporation breaches a fiduciary duty owed to the company’s creditors when corporate
22 assets are transferred to the officer).

23
24 Stanley Lund misappropriated and transferred money out of the Corporation to
25 or for the benefit of Stanley Lund or his family members. Even if, as Stanley Lund
26 has claimed, the Corporation owed him money, the Trust Fund Doctrine prohibits
27 transfers of assets to insiders of an insolvent corporation. The theory being that all of
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1 the assets of a corporation, immediately on its becoming insolvent, exist for the benefit
2 of all of its creditors and thereafter no one creditor may be given an advantage over
3 others. *Weinberg*, 410 B.R. at 29 and 34, n.10. Stanley Lund's use of corporate assets
4 for personal gain constitutes defalcation within the meaning of 11 U.S.C. §523(a)(4).
5 *Jacks*, 266 B.R. at 737. His self-dealing created a liability on his part directly to the
6 Corporation's creditors, including the Biltmore Bank. *See Jacks*, 266 B.R. at 736;
7 *Weinberg*, 410 B.R. at 34.

8
9 **The Biltmore Debt was caused by defalcation.**

10 Federal law defines what constitutes a defalcation. It is a "misappropriation of
11 trust funds or money held in any fiduciary capacity (and the) failure to properly account
12 for such funds." *Niles*, 106 F.3d at 1460; *Lewis*, 97 F.3d at 1186. Using corporate
13 funds for personal use would constitute defalcation when the corporation is insolvent.
14 *Jacks*, 266 B.R. at 737-38. Stanley Lund does not contest that he caused the
15 Corporation to make the Monetary Transfers to him or his family members after the
16 corporation became insolvent.

17 Intent is not an issue. In *Lewis*, the Ninth Circuit held that defalcation for the
18 purpose of Section 523(a)(4) includes any behavior by a fiduciary, including innocent,
19 negligent and intentional defaults of fiduciary duty resulting in a failure to provide a
20 complete accounting. 97 F.3d at 1186-87 (*citing Woodworking Enters., Inc. v. Baird (In*
21 *re Baird)*, 114 B.R. 198, 204 (BAP 9th Cir. 1990)). *Lewis* specifically overruled *In re*
22 *Martin*, 161 B.R. 672 (BAP. 9th Cir. 1993), which had held the mere failure to use
23 ordinary care in accounting for an asset does not constitute defalcation, and that there
24 had to be a showing of some element of bad faith or reprehensible conduct. Thus, an
25 individual is liable for defalcation where he personally used corporate funds or
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1 transferred corporate assets to a corporate insider, even without the intent to defraud.
2 Lewis, 97 F.3d at 1186-87. *Accord Jacks*, 266 B.R. at 787. The Monetary Transfers are
3 therefore subject to the Arizona Trust Fund Doctrine regardless of Stanley Lund's intent
4 with respect to the Biltmore Debt or with respect to any other debts of the Corporation.
5 Stanley Lund's actions in effecting the Monetary Funds constitute defalcation while in a
6 fiduciary capacity.

8 Damages

9 Under the Trust Fund Doctrine, an officer of an insolvent corporation that
10 receives preferential transfers is liable to each creditor of the corporation in the amount
11 of that creditors' *pro rata* interest in the transfers. *Weinberg*, 410 B.R. at 35. Stanley
12 Lund paid himself or insiders the sum of \$97,018.30 from the Assets of the Corporation
13 after the Corporation became insolvent. This amount is subject to the claims of
14 Corporation's creditors. Biltmore Bank is entitled to its *pro rata* interest in the
15 Monetary Transfers on account of Stanley Lund's breach of fiduciary duty.

16 As of the Petition Date, Biltmore Bank was owed the sum of \$301,291.52, plus
17 accrued post-judgment interest in the amount of \$7,015.90, for a total amount of
18 \$308,307.42. According to the Claims Register, the total amount of creditors claims
19 filed in the case is \$685,857.84.¹ A significant portion of these claims appear to be
20 debts owed by the Debtors personally and are not debts owed by the Corporation.
21 Therefore, these claims should not be counted for purposes of determining the Biltmore
22 Bank's *pro rata* interest in the Monetary Transfers. Further discovery is needed to
23 determine which claims are claims against the Corporation. However, even if all claims
24 that have been filed in this case were counted for purposes of the Trust Fund Doctrine
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28 ¹ Biltmore Bank does not waive any claim it may have to argue that certain of these claims may be invalid or held
by insiders and should therefore not be counted under the Trust Fund Doctrine.

1 damage analysis, Biltmore Bank's *pro rata* interest in the Monetary Transfers would be
2 \$43,658.24.² Accordingly, the Biltmore Bank should be granted a nondischargeable
3 judgment against the Debtors, pursuant to 11 U.S.C. § 523(a)(4), in the amount of at
4 least \$43,658.24.
5

6 WHEREFORE, Biltmore Bank requests entry of judgment in favor of Biltmore
7 Bank and against the Debtors as follows:

8 A. Declaring the Debtors' obligation to Biltmore Bank to the extent of Biltmore
9 Bank's *pro rata* share of the Monetary Transfers in the amount of at least \$43,658.24 is
10 nondischargeable, pursuant to 11 U.S.C. § 523(a)(4);
11

12 B. Ordering that further proceedings be scheduled and conducted for the purpose
13 of determining: (1) the liability of the Debtors to creditors of the Corporation for the
14 transfer of other assets of the Corporation, including but not limited to the Assets
15 described above; (2) whether a discharge in bankruptcy should be denied, pursuant to 11
16 U.S.C. §727(a)(2); (3) Biltmore Bank's *pro rata* interest in the Monetary Transfers; and
17 (4) any other claims and causes of action not addressed in this Motion; and
18

19 C. For such other and further relief the Court deems just and proper.

20 DATED this 12th day of April, 2010.

21 **COLLINS, MAY, POTENZA, BARAN & GILLESPIE, P.C.**
22

23 By Theodore P. Witthoft /021632
24 Theodore P. Witthoft
25 Attorneys for The Biltmore Bank of Arizona
26
27

28 ² Biltmore Bank holds at least 45% of the claims against this estate. Therefore, Biltmore Bank is entitled to at least 45% of the aggregate amount of the Monetary Transfers (.45 X \$97,018.30 = \$43,658.24).

1 Copy of the foregoing mailed this
2 12th day of April, 2010, to:

3 Joseph W. Charles, Esq.
4 P.O. Box 1737
5 Glendale, Arizona 85311-1737
6 Attorneys for Debtors

7 Scott Zwillinger, Esq.
8 Zwillinger Greek Zwillinger & Knecht, PC
9 2425 East Camelback Road, Suite 600
10 Phoenix, Arizona 85016
11 Co-counsel for The Biltmore Bank of Arizona

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11 /s/ Lisa Harnack